UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE VOLOKH, RUMBLE CANADA INC., and LOCALS TECHNOLOGY INC.,

Plaintiff,

-against-

LETITIA JAMES, in her official capacity as Attorney General of New York,

Defendant.

: Docket # 1:22-cv-10195-ALC

: New York, New York

PROCEEDINGS BEFORE
THE HONORABLE ANDREW L. CARTER
UNITED STATES DISTRICT

APPEARANCES:

For Plaintiff:

FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
BY: DANIEL ORTNER, ESQ.
DARPANA MUKUND SHETH, ESQ.
JAMES MICHAEL DIAZ, ESQ.
JARED MIKULSKI
510 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106

LIPSITZ GREEN SCIME CAMBRIA LLP
BY: BARRY COVERT, ESQ.
42 Delaware Street, Suite 120
Buffalo, New York 14202

For Defendant:

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
BY: SETH J. FARBER, ESQ.
KATHERINE R. JANOFSKY, ESQ.
RICHARD W. SAWYER, ESQ.
28 Liberty Street
New York, New York 10005

Transcription Service: Marissa Mignano Transcription
Phone: (631) 813-9335
E-mail:marissamignano@gmail.com

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service

INDEX

E X A M I N A T I O N S

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE DEPUTY CLERK: Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please?

MR. FARBER: Good afternoon. This is Seth Farber from the Attorney General's office. With me is Kate Janofsky.

MS. JANOFSKY: Good afternoon.

THE DEPUTY CLERK: Thank you, Mr. Farber. Thank you, Ms. Janofsky.

And someone else is on the line?

MR. SAWYER: This is Rick Sawyer, also from the Attorney General's Office.

THE DEPUTY CLERK: Thank you, Mr. Sawyer. Is there anyone else?

MR. SAWYER: Thank you.

THE DEPUTY CLERK: Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please?

MS. GANS: Hi. This is Courtney Gans, Judge Carter's law clerk.

THE DEPUTY CLERK: Good afternoon, Courtney.

Is there any other counsel on the line whose name I did not take at this time? Thank you.

Good afternoon. This is Tara, Judge

Carter's deputy. Who just joined the call, please?

MR. ORTNER: Good afternoon. This is Daniel Ortner on behalf of the plaintiffs.

THE DEPUTY CLERK: Thank you, Mr. Ortner.

Mr. Ortner, how do you pronounce the last name of the first plaintiff listed, please?

MR. ORTNER: Eugene Volokh.

THE DEPUTY CLERK: Volokh. Thank you, sir. Do you have cocounsel --

MR. ORTNER: I'm sorry, could you repeat your question? I apologize.

THE DEPUTY CLERK: Will you be having cocounsel joining you, Mr. Ortner?

MR. ORTNER: Yes, several of my colleagues are going to be joining. I can -- do you want me to give you their names or do you want to wait until they join?

THE DEPUTY CLERK: I'll wait until they join.

Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please.

THE COURT: Hi, Tara. It's Judge Carter.

THE DEPUTY CLERK: Hi, Judge.

Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please?

MR. ROSS: Yes, this is Michael Ross. Member of the public.

THE DEPUTY CLERK: Thank you, Mr. Ross. You can just put your phone on mute.

MR. ROSS: Will do.

THE DEPUTY CLERK: This is Tara, Judge Carter's deputy. Who just joined the call, please?

MR. CASTILLO: Hi, Tara. This is Julio Castillo, Judge Carter's law clerk.

THE DEPUTY CLERK: Hi, Julio.

Do we have any additional counsel on the phone as of yet for the plaintiffs?

MR. ORTNER: I don't know who has joined. I know there's a few that -- a few that are planning to join, but I haven't heard them join yet.

THE DEPUTY CLERK: Okay. Thank you.

Hello. Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please?

MS. SHETH: This is Darpana Sheth from FIRE.

THE DEPUTY CLERK: Thank you, Ms. Sheth. Who else just joined?

MR. ELLIS: Michael Ellis from Rumble Canada and Local Technology, Inc.

THE DEPUTY CLERK: Thank you, Mr. Ellis.

Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please?

MR. DIAZ: This is James Diaz on behalf of plaintiffs.

THE DEPUTY CLERK: Thank you, Mr. Diaz.

Mr. Ortner, is that everyone, sir?

MR. ORTNER: I believe that Barry Covert, who's the New York based local counsel, should be joining as well. I'm not sure if he's been on the call yet.

THE DEPUTY CLERK: No, he hasn't joined as of yet. I'll give him --

Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please?

MR. MIKULSKI: Hi. Yes, my name is Jared Mikulski. I am a litigation fellow at FIRE.

THE DEPUTY CLERK: You just called to listen to the argument today, sir?

MR. MIKULSKI: Correct.

THE DEPUTY CLERK: Okay. If you can just place the phone on mute.

MR. ORTNER: He's with plaintiffs, although he's not on the briefs but -- not admitted, but he's with us -- with FIRE.

THE DEPUTY CLERK: That's fine. He can just place his phone on mute. Thank you.

Good afternoon. This is Tara, Judge Carter's deputy. Who just joined the call, please?

MR. COVERT: Barry Covert.

THE DEPUTY CLERK: Thank you, Mr. Covert.

So, counsel, this oral argument -- this telephone -- telephonic oral argument is being recorded. So I ask that each time when you address the Court, please state your name prior to speaking and when you're not addressing the Court, to please place your phone on mute. Thank you.

Civil cause for a telephone oral argument on the motion for preliminary injunction in case number 22-CV-10195, Volokh, et al. vs. James.

Counsel, please state your appearances.

For the plaintiff.

MR. ORTNER: Thank you. My name is Daniel Ortner, here on behalf of the plaintiffs, Eugene Volokh, Rumble Canada, Inc., and Locals Technology, Inc.

MR. COVERT: Good afternoon. This is Barry Covert. I'm also attorney for the plaintiff.

THE DEPUTY CLERK: Mr. Diaz, if you're speaking, we can't hear you, sir.

MR. DIAZ: Yes. This is James Diaz, attorney for plaintiffs.

THE DEPUTY CLERK: And Ms. Sheth?

MS. SHETH: Yes. This is Darpana Sheth, attorney for plaintiff.

THE DEPUTY CLERK: Thank you.

And for the defendant.

MR. FARBER: Good afternoon. This is Seth Farber, special litigation counsel with the Office of the New York Attorney General appearing for the defendant, Leticia James in her official capacity as Attorney General.

With me are --

MS. JANOFSKY: Katherine Rhodes Janofsky, attorney for defendant.

MR. SAWYER: And I'm Rick Sawyer, special counsel with the Office of the Attorney General for defendant.

THE DEPUTY CLERK: Thank you.

THE COURT: Hi. Good afternoon. We're here for oral argument related to the preliminary injunction issue.

Here's how we'll proceed. I have some specific questions that I'll pose to the parties. And then at the end of that, I'll give each side an

opportunity to make any brief oral argument they would like to make, touching upon any of those issues that were not addressed in the questions, or if they want to more fully expand on that. I'll give each side seven minutes at the end of my questions. Hopefully, the questions are such that it may obviate the need for much oral argument. We'll have the plaintiffs go first for oral argument, followed by the defendants.

But first, let me ask my questions. First question is that there seems to be some disagreement over what the law actually does. Can both parties just briefly explain their interpretation of the new law?

Let me hear from plaintiffs first, and then I'll hear from defendant.

MR. ORTNER: Sure. Thank you, Your Honor.

We read the law as, at a minimum, requiring three things from plaintiffs and other social media networks. The development of a policy dealing with how they will respond to state-defined hate speech, hateful conduct as the State has defined, and the posting of that policy -- the publishing of that policy on their website in a clear and accessible location. Second, a mechanism for reporting hateful

conduct on the website, which would include a way to respond to that. And third, we read the law as requiring a response based on the plain reading of the text as well, that there is a response requirement that's presumed in the text of the statute. So we see at least those three requirements. And then we also point to some of the language, the title of the law, the Attorney General's remarks and reports as suggesting that there's possibly a greater expectation of even removing content with a concomitant threat of action from the Attorney General if content is not removed.

But at the very minimum, the three things that we believe are required is the policy, the report mechanism and the response requirements.

THE COURT: Okay. Let me hear from the defendants what's your view on what the law actually does?

MR. FARBER: Thank, Your Honor.

In effect, the law requires two things. The first is that it set up a mechanism for users of a site to report complaints of online hateful conduct to the operator of the website. And part of that mechanism is a mechanism to respond to reports of those complaints. We do not believe that the

statute actually requires a response to the complaint, although it does require that the mechanism that allows for a report does provide a mechanism for a response. And second, it does -- the statute does require the posting of a policy as to how the site operator intends to respond or if it intends to respond to complaints and reports of online hateful conduct that are brought to its attention.

So there's some disagreement -- some disagreement -- some agreement and some disagreement on what the meaning of the statute is. But our view is the reporting mechanism and the policy are what the statute requires. Anything beyond that is not required by the statute.

THE COURT: Okay. So let me ask this question. It seems that there is still a disagreement as to whether a response is required and what that response must be if it is required.

Let me ask plaintiffs this question. Would it be within the purview of the law for the plaintiffs to state on their website that you have this mechanism to complain? If you have a complaint, you should email this address, but you should understand that we take the First Amendment

seriously, and we may or may not respond to your request. That's one option. Another option -- that's option one.

Option two could be an automated response that says, yes, we've received your complaint, and then either we are going to consider it or we won't consider it. If you don't hear back from us in a certain number of days, understand we're not going to do anything about it. Or it could simply be an automated response that says, we received your complaint, period.

It doesn't seem to me that there is a necessity that any response, if one is required, must be specifically tailored to the user's complaint. But let me hear from plaintiffs on that in terms of those options.

MR. ORTNER: Sure. So first of all, the first option that you mentioned, the we may or may not respond, I think that opposing counsel in their opposition brief suggests that all you could say is we don't respond to any complaints. That's like -- a general policy like that. I don't think that would be enough as far as the hate-speech policy goes because if you look at the language of the statute, it requires a clear -- clear policy that

states how they will respond and address their reports of incidents of hateful conduct on their platform. So I think at the very least it requires specific statement from the site of how they will respond to the speech that the State has identified in the statute as hateful conduct. So just like a very general statement, like we may or may not respond to any reports, feel free to submit them. We don't read the stat- -- sufficient because of that language that they have to have a clear policy about how they will respond specifically to incidents of hateful conduct. And I think because of the we'll respond language in section -- in subsection 3, sites are going to read that -- reasonably read that as requiring an affirmative substantive response to posts. And that's going to put pressure on them to do so. Put a burden on them that will pressure them to want to take the content down in the first place so they don't have such an obligation. And I would just point the Court to the fact that we had to bring a lawsuit to have the Attorney General clarify and say no response is required. That puts -- chills First Amendment activity for websites that are going to read the law. I think reasonably so, does it require a

response, as it says. Will -- you know, the policy has to say how they will respond and address. And then in Subsection 5 -- sorry, Subsection 4, where it says what they could be held liable for, it mentions receiving -- receive a response on such report. And so I think a reasonable reading for a website would be we have to respond, we have to have every individual receive a response on the report and if we don't, we're going to be investigated and fined by the Attorney General. That chills First Amendment protected activity on these websites.

THE COURT: Let me ask plaintiff this. Why -- if the policy that the social media platform adopts says that this is how we will respond, we will ignore it. This is how we will address it, we will ignore it. Doesn't that comply with the law?

MR. ORTNER: I think that the law is ambiguous and open-ended enough to -- that a plaintiff -- a website would reasonably believe that an obligation, especially if you look at some of the language we cite in our brief from the Attorney General and from the legislative history. For instance, the governor, you know -- when the press conference signing the law said that the Attorney General will be championing this cause of every

power her office can bring in at her disposal. The floor debate emphasized that we have an active Attorney General. I think -- that the language pointing to that the Attorney General is going to -- actively be applying this to the fullest power that she's been given. And so in light of that, this law has a -- those languages. If it is an ambiguity, we think it's the best reading. But even if it's ambiguous, it chills protected activity. It pressures these sites to take down this content to avoid investigation, to avoid stepping -- writing afoul of what the Attorney General is going to do.

THE COURT: Okay. Thank you. Let me ask this question to both parties. We'll start with defendants first.

Can you address the title of the law? Because the title indicates that the law will prohibit hateful conduct, but that doesn't seem to comport with the text of the actual law. Can you address that, defense counsel? And then I'll give plaintiffs' counsel an opportunity to address that.

MR. FARBER: Sure.

No, Your Honor is absolutely right on that. The title of 394-CCC is Social Media Networks Hateful Conduct Prohibited. I cannot speak to why

it was titled that. I can tell you that the text of the operative statute itself deals with the two points I made, the reporting mechanism and the policy.

So in this case, this is a pretty unambiguous statute as to what it requires as far as a reporting policy and a reporting policy and the reporting mechanism. So in that sense, we cited some cases for the proposition that under these circumstances, the title just does not preempt or override what the plain text of the statute does. So, as I said, I can't speak to why it's called that, but no hateful conduct as described in this statute is actually prohibited by the statute. Thank you.

THE COURT: Okay. Let me hear from plaintiffs' counsel.

MR. ORTNER: Sure. Your Honor, with the First Amendment, there's a real fear of a chilling effect on First Amendment activity. The First Amendment is there to protect against that chill. And so the title is another piece of that chilling effect that this law has on plaintiffs and other social media networks. So, you know, the combination, again, of the title, the language in

the Attorney General's report, the finding statements, the floor debates, all very clearly suggest that there's more being demanded than simply stating a policy of we won't do anything about speech.

I really want to point Your Honor to the Bentham Books case that we discuss in our opening brief. This combination of the kind of carrot and stick, the you do need to do this, and if you don't, we're going to hammer down on you and take action against you and investigate you and pass additional policies that are going to regulate you further. That violates the First Amendment in and of itself. That combination, that's what's really happening in this case with the law and the title. And all these pieces together are putting pressure on plaintiffs and others and chilling their First Amendment activity. And so that, at the very least, title plays that role of, again, hitting -- you know, suggesting the plaintiffs that they have to act or there's going to be consequences for the failure to act.

THE COURT: Okay. Let me ask defense counsel this question. Can you articulate why, in your view, this law does not regulate speech? You

indicate that you think this regulates conduct but not speech. Can you elucidate that a little bit more?

MR. FARBER: Yes, Your Honor.

It does not require the removal, the moderation, indeed the regulation of any speech that's on any of the plaintiffs' websites, or indeed on anyone's website. What it does is it affords a channel that in some cases may already exist for those entities that already post a means to facilitate complaints being brought to their attention. It mandates that. In this case, it mandates a specific category of complaints. But the statute does not limit what the platform for complaints shall be limited to.

Similarly, it does require the posting of a policy which may well constitute speech of a kind, but it's commercial speech. The policy would presumably be truthful. It would presumably be the website's factual policy as to how they intend to deal with these responses. And that's it. We are not regulating speech. The definition of hateful conduct is simply a guide to users who may want to bring complaints of what they perceive as hateful conduct to the website operator. The website

operator may have a completely different definition of hateful conduct, or the website operator may not believe that there is such a thing as online hateful conduct, and they can either respond or not respond as they see fit, and they are welcome to have that as their policy, or indeed any policy they want. As we showed in our brief, the legislative history was quite consistent with broad discretion on the part of the website operators as to how or if they want to respond to these complaints. So Your Honor was absolutely right in suggesting that the possibility of no response complies with this law.

Thank you.

THE COURT: But let me ask defense counsel this follow up.

MR. FARBER: Sure.

THE COURT: The law doesn't -- it would be one thing if this was a law that said social media platforms must have a policy for users to complain about content, period. But this law targets a certain category of speech, hate speech, and it targets a particular category of speech and a particular viewpoint in terms of those people who the speech is pointed at. How does that change the consideration and how does that not then burden

speech?

It'd be one thing if this was a very neutral policy that simply said you must have a policy -- you must have a methodology for users to complain about content, but it specifies a certain type of speech. Would you agree that the hate speech is, in fact, speech? And if so, how should I analyze that?

MR. FARBER: Well, first of all, Your Honor, we do take issue with the term hate speech, which is not at all found within the statute, notwithstanding that that's plaintiffs' characterization. The statute speaks to hateful conduct. Our reading on this is that the complaint mechanism sets a floor. At a minimum, the website is obliged to take complaints of hateful conduct. If the website wants to take all manner of complaints through the same facility, as long as hateful conduct is permitted to be conveyed to them, we believe the statute is complied with.

So in that sense, Your Honor, it's actually much closer to the hypothetical you suggested than it is to plaintiffs' version on this. Nonetheless, the legislature believed it was important in this era of increasing violent incidents, some of which

are linked to the web, to facilitate this kind of complaint and communication mechanism.

Thank you.

THE COURT: Okay. Thank you.

But I guess the concern I have is that in the statute, the definition of hateful conduct means the use of a social media network to vilify, humiliate, or incite violence against a group or class of persons on the basis of race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity, or gender expression. Again, it's only specifying this "conduct" as it relates to certain groups of people. And it's one thing if this is prohibiting the use of a social media network to incite violence. If we're talking about true threat, those things are not protected by the First Amendment. But to humiliate or vilify a group of people seems to me to be something that's protected by the First Amendment.

Let me hear from defendants on that.

MR. FARBER: Sure. We are not disagreeing that some humiliating speech, to the extent it doesn't involve inciting a violence or, you know, arguably the fighting words or obscenity the standards that have been deemed not to be protected

speech, may well constitute protected speech. The point of this statute is that there's no consequence to the website. They do not have to take it down. The State is not mandating you must take it down, you must put a warning label on it, you must discipline the poster, or you must do anything. This is a complaint mechanism. The statute provides conduct that it wants to create a channel for site users to bring it to the attention of the site operator.

In that sense, Subsection A of the statute is a guide for users in forming their reports and complaints to the site. And arguably, it's a guide to those website operators that want to respond to it, if that is their policy. So, yes, Your Honor, arguably the subject matter might be protected speech, but this statute neither compels nor prohibits protected speech.

Thank you.

THE COURT: All right. And let me ask defense counsel this question, because it seemed to me that you were suggesting that these social media platforms could come up with their own definition of hateful conduct. It seems to me that the way this statute is written is it's more than just a guide

and that the statute sets the floor. Perhaps a website could go beyond that under this statute. But it says "hateful conduct means," and then it goes through the definition. And then Section 2 says, "A social media network that conducts business in the state shall provide and maintain a clear and easily accessible mechanism for individual users to report incidents of hateful conduct."

It seems to me that there's not discretion, the way the law is written for users -- or for the social media platforms to have a definition of hateful conduct that goes below the floor set by the statute.

Can defendants weigh in on that?

MR. FARBER: Yes, Your Honor.

The hateful conduct refers to the complaints. There's no question that the website operators are obliged to take complaints from users concerning hateful conduct. At the end of the day, however, those complaints are in the user's view. The user may well be very adept at identifying things tied to the statute's definition of hateful conduct or not. The user may have a much broader or a much narrower definition of hateful conduct. What this statute requires of these websites, however, is

that it set up the mechanism. It's largely a procedural statute, it sets up the mechanism, the complaints and reports are reported to the website, the website responds to them based on its policy, which is entirely within its discretion. So while hateful conduct may inform the reports, as far as what the website operator may actually be liable for under this statute, it does not impact that. What they are liable for is if they don't set up the reporting mechanism again.

As far as the reporting mechanism, that just sets the minimum of the complaints that they have to receive. That's all they have to do. They have to receive them. As Your Honor indicated, there does not have to be a response. In fact, it's not -- they don't even have to read them if they don't want to. But they do have to receive them. That is true. At a minimum, they have to set up a facility to receive reports of complaints of hateful conduct.

Thank you.

THE COURT: Okay. And again, for defendants, don't the social media platforms have an editorial right to keep information off of their websites, allow certain information, and to make

decisions as to what sort of community they want to create online?

And if so, does this law that requires a mechanism for only one type of hateful conduct/speech infringe upon those editorial decisions because the websites are not required to set up a reporting mechanism for people who want to make hateful comments about movie directors or something like that?

Let me hear from defendants on that.

MR. FARBER: Yes, Your Honor.

Again, the reporting mechanism is for the minimum. Again, if the site wants to set up a broader mechanism of complaints, that's within their discretion. If they would rather not go on record as to how they intend to respond to complaints, reports of online hateful conduct, under the statute -- they can comply with the statute with a policy that says we have no policy. As long as they post that, they can respond with we will address each report on a case-by-case basis and do not say how we will respond in advance. They have numerous options to do that.

But with respect to receiving the complaints, this does not impact their editorial

freedom. This sets up a complaint mechanism that does not require them to take a position on hateful conduct. It doesn't actually require them to take a position on anything other than that they've set up the mechanism.

THE COURT: Okay. Let me hear from plaintiffs on these issues.

MR. ORTNER: Sure. I'll start just briefly on the last thing that opposing counsel said that saying you have no policy would suffice. I would just -- I would say, Your Honor, first of all, I already suggested that we don't read that as compatible with the law's requirement that the policy, has to how they will deal with this type of speech on their platform. But really, if that's the case, it's hard to see how the law furthers the government's interest at all if the policy can just state, we have no policy. So I think that really undermines their ability to justify this under any level of scrutiny, ultimately, that the Court applies to this.

So going back to the beginning of your questions, Your Honor, the first question is, is this speech versus conduct? I think in this case, there is no -- they have not -- counsel has not

pointed to any conduct here. These are websites that are publishing speech. Everything on there is speech. The user content is speech. Everything that -- on The Volokh Conspiracy has news posts about legal current events. There's nothing there other than pure protected speech on those websites. So it's -- to say it's conduct is, I think, disingenuous. Opposing counsel also in their brief, uses disinformation to describe this. They're using other -- trying to find labels to label this other than what it really is, which is fully protected speech.

I point, Your Honor, to our briefing, the opening brief, where we have -- and the complaint. We have hypotheticals that this law would apply to a variety of types of speech; John Oliver comedy sketch, news analysis of a tweet by The Onion, an analysis of an art gallery opening which has something to say about patriarchy and sex and gender issues. All of that is covered by this law. So it applies very broadly to a wide range of speech.

I would say, Your Honor, that this law is clearly focused on speech. And a hypothetical that might be useful for that is to imagine a law that said a website had to have a policy dealing with

conservative speech or liberal speech or anti-American speech or pro-American speech. That would clearly be targeting speech, and it would be unconstitutional. And that's the same thing that's happening here with hateful conduct, that it's targeting this subset of speech. And I think Your Honor pointed out the language of vilify and humiliate, that it goes to all the -- it's a very subjective category of expression. Everything is in the eye of the beholder what vilifies or humiliates. And it goes to core protected speech like parody and satire that's been part of our constitutional tradition from the founding. So it sweeps up a lot of protected speech there. The plaintiffs here are publishers of speech of others, similar to what newspapers do when they compile op-eds by outside writers and letters to the editor and publish them in a newspaper. So the contrast between the case that opposing counsel uses, the Restaurant Law Center case they use in their brief, is really stark. It's very different than a restaurant serving food. These are websites functioning as publishers of speech.

And then going to the burden on the website, I think opposing counsel suggested that

this is just a guide and it doesn't do anything really that they don't have to do much of -- that much of anything. That's not compatible with what the statute actually says. But also they suggest that you need to be banning speech or outlawing speech to violate the First Amendment. And that's not the case. The Supreme Court has repeatedly held that burdens are enough. I point, Your Honor, to the Riley case that we cite in our reply brief. That case -- all that the solicitors in that case had to do was as part of their phone call, solicitation call, mention the percentage of money that they're generating that they're going to take from the money that they raise in proceeds from the call. And that was a minor burden of just having to mention, disclose the fact on a phone call. And the Supreme Court said that that burden, that changed the nature of their conversation. It undermined and diluted their message ultimately. And therefore, even though it was a relatively minor burden, still violated the First Amendment.

And then we also cite two cases involving the requirement to respond -- to either appear like you're endorsing the message of the government or respond to it. The Pacific Gas & Electric case and

the Miami Herald v. Tornillo case that we cite in our reply brief, the Supreme Court said the obligation to either to appear to agree with a viewpoint or to respond, it compels speech because it takes away that -- this is from the Court -- the choice of what not to say. And that's really what's at stake here is, the choice not to respond, not to have to either endorse -- appear to endorse the State's message that this type of speech is unique, is deserving of being taken down, or to have to respond affirmatively. And so it takes away their choice not to speak. It burdens expression. And I think Your Honor is right. The other question they have an editorial right to keep information off the website at a minimum, this burdens that by requiring them to say what they're going to say, takes away their ability to just have no policy or have discretion in that regard. So it at a minimum, imposes a First Amendment burden on plaintiffs.

THE COURT: Okay. And plaintiffs, let me ask you this question. Hypothetically if there was a law that said that social media platforms needed to have a mechanism for users to complain about content, period, without specifying any particular type of content, would that violate the First

Amendment?

MR. ORTNER: I think it would still impose a burden on the First Amendment. And then you'd have to analyze that under the standard of view, just to look at the evidence that the opposing counsel would have for a compelling interest. But the big difference there is it would be content neutral and viewpoint neutral. It would be you just have to have a policy -- or you just have to have a mechanism, it doesn't matter for what kind of speech.

What's really at stake here is that -- Your Honor mentioned this is content based and viewpoint based. So let's say that a website wanted to have either a policy that just said, we will only accept complaints about conduct that, let's say, incites violence or is a true threat, that would not suffice under New York's law. You have to include the category, all the category, the whole category of speech that New York is pointing to, including vilifying and humiliating speech. And so that's what makes this law particularly egregious, is that it requires them to -- it required -- it includes that subset of speech in what they're including in their policy and in what reports they're going to

take, what complaints they're going to take. And then we also believe -- argued that they have an affirmative duty to respond. Also, again, defined based on viewpoint. If someone complains about something that's not subject to the law, there's no obligation. So the obligation is based on, again, the viewpoint and the content of the speech. And that's what really makes this law particularly egregious. And clearly, in the realm of strict scrutiny, which defendants do not -- defendant does not argue that the law satisfies strict scrutiny in their briefing and that because it's a viewpoint based, it falls under that category, under that standard.

THE COURT: Plaintiffs, let me ask you this hypothetically. If New York enacted a law that required social media companies to provide a mechanism for its users to complain about a data privacy breach, would that also run afoul of the First Amendment?

MR. ORTNER: Sorry, Your Honor. I'm thinking through that. I think the -- you know, data privacy breach -- complaining about that, a data privacy breach, is not complaining about a particular content or viewpoint of speech. And so

that puts us in a different category than this law, which requires the ability to complain about speech on the website. The data privacy breach is an action that has happened to a user. So there's still the element of requiring them to set up a mechanism which has an element of speech to it. But I think it's substantially different because you're not allowing that -- requiring them to be able to complain about the speech on the website. It's unrelated to speech, ultimately, the fact that there was a data privacy bridge on the website. And so that would put it out of the realm of these First Amendment cases that we're talking about, out of the realm of scrutiny, and it would be likely -- much more likely to survive scrutiny under a lesser standard.

THE COURT: Okay. And let me ask plaintiffs this question. Defendant hasn't specifically addressed standing, but does this law apply to all of the plaintiffs? In particular, Plaintiff Eugene Volokh operates a legal blog. Does that constitute a social media network under this law?

MR. ORTNER: It does, Your Honor, under the definition that the law uses. New York has used an

incredibly broad definition. It really covers any website that makes a profit in the State of New York and has comments or some ability to share content because it says service providers, which operate platforms designed to enable users to share content with other users or to make such content available to the public.

And there were ways that the law could have been drafted more narrowly. Earlier versions of laws that legislators in New York attempted or considered were drafted to exclude websites like Volokh -- like The Volokh Conspiracy. We talked about that in our opening brief. There was language readily available to the State of New York to narrow the law, but they chose very broad language. And then the floor speech that we point to, also in our opening brief, the lawmakers there were -- one of the chief sponsors of the bill, Congresswoman Fahey, was specifically asked about who would the law apply to and specifically said it would apply to anyone that has a presence in the State of New York that operates a website. Essentially, very, very broad interpretation. Finding her exact language -- and I apologize, Your Honor. But the language there specifically was broad and open-ended in who it

applied to.

And then I would also then finally point to the fact that opposing counsel does not contest the fact that we assert that it applies to Eugene Volokh, and they don't respond to that. And then I would say it finally clearly applies to Rumble and to Locals. And Rumble is even mentioned in the AG's report, which strongly suggests that Rumble is on their radar and the law would be applied to them -- to Rumble.

THE COURT: Defense counsel, can you explain why you believe that rational basis is the appropriate standard of review as opposed to strict scrutiny?

MR. FARBER: Yes, Your Honor.

We are not prohibiting speech. We are not compelling non-commercial speech. In order for the Court to grant the injunction requested, it would have to find that GBL394-CCC is a content based regulation that compels non-commercial speech. And it is not. Speech is not compelled here. A mechanism for complaints, which, of course, must include what users believe is online hateful conduct is provided for. There is no requirement that that be responded to. There is no requirement as to what

policy the given websites must have in response to it. We are not compelling viewpoint. We are not compelling any message.

Frankly, counsel alluded to the contents of his client's websites, which we do not dispute could well be largely, or perhaps even entirely protected speech, certainly to the extent it is the speech of third parties. And that is why this statute does not regulate it. We do not require any particular moderation policies. We do not require any sanctions for any kind of speech, including removal, highlighting, flagging, or anything of the kind. This is a very specific statute. It requires the reporting mechanism. As Your Honor noted, it could have required all complaints, in which case counsel for plaintiff responded that he would regard that as unconstitutional. With regard to Your Honor's question of a data breach, that's a number of possible implications of that. One possible data breach could be that one user posts data of another user online, in which case how that would be addressed would arguably be part of a complaint mechanism.

At this point, we believe that the complaint mechanism, as we set it up, does not

regulate protected speech and therefore is not subject to strict scrutiny. In fact, it is rational basis. The State has a strong interest in that users of websites are well informed as to what those websites policies are and that they have an ability to complain to them. And similarly with the policy of the website posting, it is rationally related to advancing that policy.

Thank you, Your Honor.

THE COURT: Let me just follow up then with defense counsel.

MR. FARBER: Sure.

THE COURT: Tell me more about why you think that there is a rational basis here and what is the -- because the briefing seems to indicate that you take the position that somehow this is related to incidents like the shooting in Buffalo. Is that no longer your position?

Can you tell me -- especially since, as you indicated, it seems that many social media users are quite knowledgeable, and it seems that certain social media platforms, I think folks kind of know which ones tolerate all sorts of speech as opposed to others, and maybe that's why they go to certain social media platforms.

But can you just tell me more about that, defense counsel?

MR. FARBER: Certainly, Your Honor.

To the extent that we are in an unfortunate era of increasing acts of violence and that oftentimes those acts of violence are, if not foreshadowed, at least indicated online, the ability of users of social media networks to bring such incidents to the attention of the web operator is a reasonable response to the unfortunate increase in those kinds of events. Second, this statute is advancing the cause of more informed consumers. It's true that certain websites develop certain reputations over time, but not all. It's not readily apparent to consumers. This will make it more readily apparent at the outset. So both of those are important State concerns, and both of them are addressed by the statute.

To go back to the case of the Buffalo shooting and to compare and contrast it to another famous shooting in New Zealand. In the Buffalo situation, the livestream on a platform called Twitch was promptly brought to the operator's attention by various users of social media, and they managed to take that livestream down, I understand,

in less than three minutes. By contrast, the horrible mass shooting incident in New Zealand, I believe was on a Facebook platform there, that incident lasted well over nine minutes. There were no complaints, as we understand it, made to the operator, or at least none were facilitated, and the operator was not aware of those events and did not manage to take it down.

So in this case, the difference is Twitch had set up a means of users making complaints and it chose to take action. For purposes of this argument, I'm not suggesting that it was required to take action, but it did take action and providing it with the information to do so helped it to achieve its goal in that case. In any event, what we are suggesting by the statute is that creating this facility does not impact anyone's speech. It does not require that any speech at all, even what some people might regard as hate speech, be taken down or sanctioned in any way. On the other hand, complaints that might very well be very important to the operator are brought to the operator's attention.

So we would respectfully submit that the statute easily meets rational basis. And I note

that in the reply papers, the plaintiff did not challenge that there was no rational basis for the statute. I should add that in the Restaurant context, similarly, the information we require with regard to policy is factual in nature, analogous to the Restaurant case we cite with calorie count. It may be information that the user doesn't want its customers to have, but it is factual and does not violate the First Amendment when required to do so. So we believe that the statute amply meets the rational basis standard.

Thank you.

THE COURT: And let me just ask a follow-up question. It seems to me that the livestream that you're referencing regarding the Buffalo shooting, that probably isn't speech in the first place. And the issue here is if the platforms are not required to do anything, then I'm not sure what -- I understand that in the abstract there's a possibility that something could happen and the website might take something down. So the harm that is being sought to prevent is the what? Is the exposure of other people to the livestream? Because this statute goes further than just the inciting violence. This talks about, again, the vilification

humiliation, these other things. And certainly that may have been part of the incitement to violence, but it seems to me that there are some important distinctions there.

Can I hear from defense counsel on that?

MR. FARBER: Yes, Your Honor.

Yeah. The Buffalo shooting was obviously a unique tragedy and we are not suggesting that this statute will guarantee that events like that never happen again. But in this case, this was a growing body of what could be perceived as online hateful conduct and basically was not, as far as we know, previously brought to the attention of website operators that might or might not have taken action on it. But nonetheless, the channel to bring this sort of thing to website operators who might choose to respond, even though the government does not compel them to suspend a user or remove content, the websites may choose to do so. In any event, to, in this case, compel more information available rather than less is rational. So in this case, the law doesn't -- there's no way to say that this law would prevent the next Buffalo shooting, but it allows complaints to be brought to the attention of operators, and it allows users to know what's going

to happen to those complaints, and those are rational purposes. And the legislature was careful here. The legislature was very cognizant of the First Amendment. That's why we have the savings provision of paragraph four of the statute. And so the legislature was concerned with the First Amendment and wanted to operate within its bounds. That's why we have the law we have, so it's rationally based.

Thank you, Your Honor.

THE COURT: Okay. And also for defense counsel, you said that this doesn't compel the plaintiffs to speak, but can you tell me why requiring the plaintiff to have a policy regarding a certain type of conduct/speech isn't compelling them to speak? It may not be compelling them to necessarily take an affirmative up-or-down position on that, but it is compelling them to speak about that and to speak about that conduct and speech as opposed to any other.

Can you tell me about that, defense counsel?

MR. FARBER: Certainly, Your Honor.

This again comes back to the Restaurant and the calorie case, or a case involving disclosure of

mercury hazards out of Vermont that we cited in our brief. There are situations where truthful commercial speech can be compelled without running afoul of the First Amendment. We cite them on pages 7 through 11 of our opposition brief.

In this case, we would argue that that's what the policy falls into. It falls into a truthful disclosure of fact. The substance of what's hateful conduct may be very controversial, but how the website intends to respond to it is not. That's a binary. That's we will respond, we won't respond. And then if we will respond, this is what our response is going to be. So that may well be compelled speech. But it is -- if it is so, it is compelled commercial speech of a factual nature that the case law has permitted. The amount of calories in a meal is not a viewpoint. A complaint policy is not a viewpoint. Although even if plaintiffs are going to argue that it is, it's their policy. It's not compelling a position at all. It's simply disclosing what are they going to do to these reports of hateful conduct brought to their attention.

THE COURT: Okay. And let me ask defense counsel this question. What is the defendant's

position if this case is analyzed under strict scrutiny? Does the sentence concede that this law doesn't pass strict scrutiny?

MR. FARBER: We will have a very difficult time, Your Honor, with that.

First of all, we did not address that in our brief, just as plaintiffs did not address rational basis. I would concede that we would have a very difficult time with strict scrutiny. We certainly have a compelling state interest in minimizing and reducing events like the Buffalo event and similar acts of hateful conduct, violence, mass shootings and the like. It is not clear that this particular statute is narrowly tailored under those circumstances.

So I would answer it that way. I would answer that we would have a difficult time. However, I would argue that we never get there because this is not a content-based statute. This does not compel speech. This does not prohibit speech. This does not -- plain and simple, this does not require these websites to alter their editorial content or their editorial policy. It does not require the removal or flagging of anything that appears on their website.

Thank you.

THE COURT: Okay. Thank you.

Plaintiffs, let me hear from you as to why you believe that strict scrutiny is appropriate here.

MR. ORTNER: Sure. Thank you, Your Honor.

I think we obviously interpret the statute more broadly than defendants do. We think our reading is the best reading of the text of the statute, and our reading is true that it requires a direct response to every single complaint that is lodged. Clearly, that's compelled speech, and under strict scrutiny. I don't think defendants would necessarily -- they don't try to disagree with that. And so I think under our interpretation of the statute, strict scrutiny applies.

But even at, like, the minimum level of the policy, which requires the posting of -- well, first of all, the development of a policy if they don't have one already, which I think is significant, it requires these websites to actually come up with a policy to deal with the specific subset of speech if they don't already have one, and then post it publicly. That is compelled speech.

I would just -- to point out, make the

analogy, look at the Zauderer standard and the Big Mac case about calorie counts. I think two things to that, Your Honor. First of all, dealing with hate speech is not like the number of calories in the Big Mac. Everyone disagrees about what is hate speech. It's a very case-by-case assessment for a website operator to decide is this speech acceptable or not. That discretion is left to the website now and -- and New York's law requires them to clearly -- articulate a clear policy about this, so to actually spell it out what they're going to do. And so that requires them to take a stance on that where now they have the ability to be silent.

So Zauderer doesn't apply in that regard because it's not -- uncontroversial factual information. It's much more similar to the Entertainment Software Association. It's a case about video games -- video game makers having to label -- put a sexually explicit content label on their games, very similarly casting a value judgment of sorts about the nature of the speech or the R.J. Reynolds cases, two of them, involving tobacco labeling and skull and crossbones or other images on tobacco labels. Again, it's the fact that -- just the nature of the label that they're using of

hateful conduct is provocative value laden. It's crafted to evoke an emotional response. It's a subjective and highly controversial message that they're forcing plaintiffs to either endorse or refute through stating something to the contrary in their policy. So that is very different than Zauderer.

Also, the defendants never argue why the speech here is commercial speech. For Eugene Volokh and The Volokh Conspiracy, that website generates some profit from advertisements. Publishing speech for profit does not make something automatically commercial speech. The most obvious case we've talked about already is the Miami Herald v. Tornillo case, that involves a newspaper that makes a profit from the sale of speech and their strict scrutiny applies. So the fact that someone makes a profit does not sweep it into the category of commercial speech. And the speech on Volokh's website is not commercial speech. It is analysis about legal and current events. The videos on Rumble and Locals also are largely focused on news, entertainment, sports, current events, politics, not selling a product, not an advertisement for a product. And so the speech on these platforms is

not commercial speech. There's no reason to assume that commercial speech is the proper framework to apply here.

And finally, even if it is, the Matal v. Tam case, which we cite to, that was a case involving trademark law. And so that was a trademark over the label of the name of the band, The Slants, which is actually illustrative here because it shows how hate speech is in the eye of the beholder. This is a group trying to reclaim the label of an anti-agent label and it was labeled hateful by the trademark office, and not -- you know, trademark wasn't granted because of that. It shows a little bit of the subjectivity of calling something hate speech. But in that case, it was commercial speech standard, but the Supreme Court still struck that down because it was viewpoint based. And so the fact that this law is viewpoint based, targeting a specific subset of expression only speech that is vilifies or humiliates based on specific characteristics, that clearly places this in the realm of strict scrutiny, even if commercial speech is still -- at least even if it's under Central Hudson, analyzed very aggressively as the Court did in the Matal v. Tam case. And so for --

all the reasons falls under strict scrutiny.

And I would just say one last thing is even if opposing counsel says that we just concede that rational basis that we would lose, I would disagree slightly with that, Your Honor, and to say -- to point out that we cite cases saying that one of the state's primary interest, which is getting the speech off the internet, that's what they turn to again and again and again in the legislative debates, in the AG's report, clearly saying we need the speech removed, protected expression. We cite to the US v. Eichman case, where it says the suppression of free expression is not even a legitimate government interest. And in Hurley they say it's a decidedly fatal objective to try to remove protective expression.

And so we think that the primary interest the State is pushing for in everything that they're saying in their debates in the report is not even a rational interest. And the State otherwise is just inconsistent about articulating what their interest is. And they kind of go back and forth and articulate a lot of different interests without any evidence that this is what the legislature was really thinking about or that there's evidence that

the law is needed if a higher standard applies. There's not evidence -- not sufficient evidence at all to satisfy any degree of scrutiny other than rational basis on the level of evidence. They don't point to evidence that this is necessary, that existing laws are inadequate. But you need to come into your -- draft websites into posting policies to target protect expression. And so the law clearly fails strict scrutiny.

Last thing I'd say on this, Your Honor, is the requirement to post a policy is a burden on the website's expressive activity. Eugene Volokh and The Volokh Conspiracy, Rumble and Locals, we cite to many statements on their platform about how they are facilitating free speech. People you mentioned go to these platforms because they want a place where free speech is widely tolerated. Volokh is free minds and free markets. Rumble, their purpose and mission is to protect free and open Internet and to create technologies that are immune to cancel culture. And Locals have similar statements on their website. And so being required to have a hate speech or hateful conduct policy on their website and a place for complaints, but they're going to facilitate complaints undermines their core First

Amendment message of we allow this wide variety of speech. We don't take speech down based on the viewpoint, in particular. That's really the key is they don't take speech based on the viewpoint down. And this law requires a policy dealing with just a specific viewpoint of expression. And so it undermines their First Amendment message just having it -- having to post it, even if they can respond. Again, pointing to Miami Herald and Pacific Gas Companies, that imposes a serious burden on first.

THE COURT: Okay. Thank you.

So I don't have any other questions. I'm ready for a brief, brief oral argument. I'll give each side seven minutes. You don't have to take a full seven, but let's have oral argument quickly by plaintiffs and then followed up by defendants. Go ahead.

MR. ORTNER: Sure. I think we've addressed a lot of the issues in the case. So I'll just turn very briefly, Your Honor, to the couple of things we haven't addressed and mentioned them, which is a couple of other ways that this law could be invalidated.

I think overbreadth and vagueness haven't been addressed. And I think overbreadth has really

been at the heart of the discussion in this oral argument, how this law sweeps a broad swath of potentially offensive but protected speech under its scope. If the law really was targeting what happened in the Buffalo shooting, which we say is horrific and unacceptable, but if that's what it's trying to do, the law went so far beyond just that kind of expression. Any speech that vilifies or humiliates, which as you mentioned already, could be anything from a comedy sketch to a news report discussing or to a Tweet that's retweeted to art show, really anything can be seen as offensive -- as vilifying or humiliating based on these kind of characteristics like race and sex that the State has identified. And so I think that's a real significant issue with overbreadth. It's requiring policies to deal with clearly protected expression. And I think opposing counsel conceded that effectively that this is vilifying and humiliating. Speech is protected expression. And so I think that really shows why there's an enormous overbreadth problem.

And then with vagueness, I would just point out that these laws like this, they chill not only the policies of websites, they are going to feel

obligated to take speech down, especially if they have to respond to complaints. They're going to think, well, I might as well take down speech so I don't have to respond to all the complaints that are going to come if I allow controversial speech to remain on my platform. But it also chills user speech, because if someone goes to website and they've thought in the past it's a place for free expression, and now they see a link in the bottom saying, see our hateful conduct policy, that creates a very different environment on the website for freedom of speech. It shows user expression. They're going to be more cautious in posting speech that they presume now the website doesn't want and the State of New York is targeting and opposing. And then there is I think it has already come up in this argument. There are a lot of vague terms that leave discretion to the Attorney General. The debate over whether there is a reporting mechanism -- or sorry, a response requirement at all is illustrative of that, Your Honor. That it's not clear whether one is required, the Attorney General now says it's not required. But if the Attorney General enacted or someone enacted regulations or said we are now interpreting this to require it,

they certainly could do that under the discretion -- the discretion to read the statute more broadly. And that creates serious problems, enforcement problems, especially with the aggressive rhetoric that we point to in the report. It really creates a sword of Damocles, hanging over the head of websites, where they know -- if you turn to the saying, if you don't take action, there is going to be consequences. They list several in the report legislative proposals, but with this law on the books also, it's another aspect of that where websites are afraid of investigations, of fines, of public shaming from the Attorney General. And so I think it creates an environment of chill when the law is so -- drafted with so many vague and arbitrary and unclear terms, and it really fails to define many of the key terms of the statute, as we, I think, point out in our briefing. So I think that creates a serious problem.

And then finally, Section 230 also applies and provides an alternative basis for striking down the law. It implies anytime a provider exercises a publisher's editorial function -- we cite a case in our reply, Jones v. Dirty World Entertainment Recordings from the Sixth Circuit, which talks about

that, and that includes whether to publish, withdraw, or postpone or alter content. The Second Circuit has interpreted Section 230 very broadly to protect editorial discretion of publishers. And that's what's at stake here. Our websites that are publishing third party content, having the discretion to set their own policies, to not have to articulate them in the way that New York wants them to do, to not have to take feedback about it the way the New York -- the State of New York wants them to take feedback, and to not have to respond to complaints the way the State of New York demands that they respond to complaints. All of that trumps -- supersedes their traditional editorial functions and compels them to have certain positions or to have positions and publicly state them and respond in certain ways to complaints. All of that violates Section 230. And so that's another independent reason that New York's law should be invalidated.

And then just finally, I think whatever strict scrutiny applies, defendants have essentially conceded the law fails. Even if we think -- even if Central Hudson or a lower standard applies, New York's law fails. Again, they have still have the

burden under even those lesser standards to prove the need for the law to show how this law furthers their interest. And they've really failed to do that. They undermine their own interests -- asserted interests. You know, if they're right that the law requires almost nothing from plaintiffs at all, they can't meet that. And if it requires what we say it does, then obviously strict scrutiny applies to it and it fails. And so under either conception, New York's law cannot survive scrutiny and has to be invalidated, and we're entitled to (inaudible).

THE COURT: Okay. Thank you.

Let me hear from defense counsel.

MR. FARBER: Thank you, Honor. This is Seth Farber again.

Your Honor, this is a preliminary injunction motion, and plaintiffs bears the burden on each of the elements. And in this case, they are asking the Court to strike down, find unconstitutionally duly enacted statute. So we would argue that they bear an even higher burden than they would in an ordinary PI. But under any burden, they have failed to meet their burden because Section 394-CCC simply does not target

protected expression based on content or viewpoint. In this case, the Court should apply a rational basis test. And contrary to counsel's argument, rational basis does not require a finding that a legislature had a specific rational basis in mind and that this statute brings it forth. Is there a rational basis for this? Yes. We provide consumer knowledge as to how websites operate and the State has a strong interest in taking steps to hopefully alleviate violence. That's it. We've met rational basis.

In this case, for the Court to grant the injunction sought, it would have to find that the statute is a content-based regulation that compels noncommercial speech. And it clearly is not. As we indicated in our brief, the statute does not regulate protected speech law. It applies to commercial conduct. It facilitates a reporting mechanism for individual social media users to report to the website operator. The ability of a user to report speech is not regulating speech. This contention of a chilling effect is entirely speculative. Plaintiffs fail to meet their burden on that element of the motion. The disclosure of their policy as to how to respond to reports and

nothing else is itself factual and uncontroversial. They do not have to get into the definition provided by the State or provided by anybody else on what constitutes hateful conduct. We are regulating a commercial business. In this case, they may well be in the business of putting out protected content of other people. We are not regulating that protected content. We are not regulating anything they do that is an editorial function. We are simply compelling them to have a reporting mechanism.

And I should add that the definition of hateful conduct found in the statute does not itself regulate hateful conduct. It is simply a guide to users to make complaints and to platforms as to how they respond in their discretion. The statute does not compel plaintiffs to endorse any State message or to respond to reports of any kind, including involving protected speech. The State is not requiring plaintiffs to state or endorse any particular message of conduct. The required disclosure is the constitutional disclosure of accurate commercial information only. The statute does not require any particular response or a response at all, just that the channel for reporting and responses be facilitated. There is no speech

compulsion.

With regard to the overbreadth contention. Because plaintiffs argue that the statute is unconstitutional as applied to them, we respectfully submit that the Court should not consider their facial overbreadth claim, because clearly narrowing constructions are possible even if plaintiffs want to rule them out. The statute does not prohibit or regulate speech. No restriction or removal of any content is required. To the extent speech is compelled, it is commercial speech, and overbreadth fails on this basis because the statute cannot be found overbroad if the subject is commercial speech only. Even if the statute reaches some protected speech or conduct, it is still not overbroad in relation to its legitimate scope.

With respect to vagueness, this statute clearly affords plaintiffs of notice of conduct they would be liable for. They have to have a complaint mechanism, and they have to have a response policy. That's it. The definitions of hateful conduct themselves are readily understood and have plain objective meanings, but those terms are only provided to define the scope of reports from users. Adequate notice to plaintiffs is more than

adequately spelled out here. The title of the statute does not override the clear statutory text. The statute provides sufficiently clear enforcement standards to eliminate the risk of arbitrary enforcement or to prohibit conduct that falls within the core of the statute's prohibition. Enforcement is not the result of unfettered latitude here.

To the extent that plaintiffs argue that the statute has a chilling effect on the exercise of First Amendment freedoms, that is nothing more than speculative in this case. The saving clause is not vague in its own right. And in any event, plaintiffs can't use the legislature's efforts to protect First Amendment freedoms to claim that the statute violates the First Amendment.

Regarding Section 230 preemption. Section 230 immunity applies only when content is created entirely by third parties. It does not apply to content the website creates itself, which in this case would be the complaint mechanism, and their policy. The statute avoids liability on these users for content published by third parties. They would be liable only for their own failure to create a reporting mechanism.

Finally, with regard to Section 4, we

respectfully submit that plaintiffs misread Section 4. What it requires is a mechanism to report and a mechanism to respond. As Your Honor indicated, it does not require a specific response on their part if they choose not to make one.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

I do have one other question. I know that plaintiffs request is that I strike down the entire statute.

Let me just ask counsel this hypothetically. Would it be permissible for me to strike sections of the statute, or is this an all or nothing proposition?

Let me hear from plaintiffs counsel, then I'll hear from defense Counsel.

MR. ORTNER: I think, Your Honor, the law is integrated ultimately. All these sections work together. Going, for instance, the saving statute that defendant points to, that saving statute can't save the law, the plain meaning of which is regulating and compelling speech. I'm not sure exactly what Your Honor has in mind of what to strike down or not to strike down, but the law ultimately works together and has an effect together

on all unburdening protected First Amendment activity. And so don't believe that just striking down certain provisions is possible in this case, given the First Amendment impact of the whole law that the legislature has enacted altogether in one package. So we would not support that outcome as the law justifies it.

THE COURT: Okay. Defense counsel?

MR. FARBER: Well, I'm not sure which provisions Your Honor would consider.

THE COURT: This is just a hypothetical. This is just a hypothetical.

MR. FARBER: Hypothetically. I mean, hypothetically, you know, I'm not sure. I will candidly say I was not expecting that question.

I note that plaintiffs, of course, are asking to strike the entire statute. And I think I'll go back to where I came in on this, is that the statute requires a couple of different things. The statute requires a, you know, reporting mechanism, that that reporting mechanism contain a response mechanism, and the statute requires the posting of the policy. I would argue that those are separate things. And that, hypothetically, if the Court were so inclined, it could treat them separately. I note

that the statute does not contain a non-severability proceeding -- I'm sorry -- a provision that says it's non-severable. That's not necessarily binding in any event.

But in this case, the plaintiffs say that the statute is content based. It is not. We don't -- that said, Your Honor, under these circumstances, we respectfully submit that what you should do is deny the entire preliminary injunction motion.

Thank you.

THE COURT: Okay. Thank you. We are adjourned.

Anything else from plaintiffs' counsel?

MR. ORTNER: No, Your Honor. Thank you very much.

THE COURT: Anything else from defense counsel?

MR. FARBER: Thank you, Your Honor. Just a housekeeping matter. Our response to the complaint is due in about four days. We will be contacting plaintiff concerning extending that time.

THE COURT: Okay.

MR. FARBER: Thank you.

THE COURT: Thank you. We are adjourned.

Thank you.

MR. FARBER: Thanks so much.

C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of VOLOKH, et al. v. JAMES, Docket #1:22-cv-10195-ALC, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Mignano

Marissa Mignano

Date: December 21, 2022